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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PATRICK M. KENNEDY, JR., Defendant and Appellant.	2d Crim. No. B203345 (Super. Ct. No. 1235733) (Santa Barbara County)

Patrick M. Kennedy, Jr., appeals the judgment entered after a jury convicted him of forcible rape (Pen. Code, § 261, subd. (a)(2));[1] torture (§ 206); kidnapping for the purpose of rape (§ 209, subd. (b)(1)); making a criminal threat (§ 422); dissuading a witness by force or threat (§ 136.1, subd. (c)(1)); assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)); and bigamy (§ 281, subd. (a)). The jury also found true personal firearm use allegations as to all counts. (§§ 12022.5, subd. (a), 12022.53, subd. (b).) On the forcible rape count, the jury found true the allegation that in committing the offense appellant kidnapped the victim, inflicted torture and great bodily injury, and personally used a deadly weapon. (§ 667.61, subds. (c), (d)(2) & (3), (e)(3) & (4).) The jury also found true the allegation that appellant personally inflicted great bodily injury in committing the assault. (§ 12022.7, subd. (e).)

[1] All further undesignated statutory references are to the Penal Code.

He was sentenced to 23 years 4 months plus 32 years to life in state prison. He contends (1) the trial court failed to adequately address his last *Marsden*[2] motion; (2) the court erred in denying his request to reopen to permit him to testify; (3) the court erred in admitting evidence of prior uncharged misconduct under Evidence Code sections 1108 and 1109; (4) the evidence is insufficient to support his convictions for forcible rape, torture, kidnapping, and the kidnapping and torture special circumstances; (5) the court erred in refusing to appoint advisory counsel and grant a continuance of the sentencing hearing after granting him pro se status; and (6) he was subjected to multiple punishment in violation of section 654. We shall order the sentence modified to reflect a stayed sentence on the torture count. We also order correction of a clerical error in the abstract of judgment. Otherwise, we affirm.

STATEMENT OF FACTS

Appellant's Offenses Against Jane Doe

Jane Doe met appellant in December 2006. Shortly thereafter, the two began dating and having sex. Doe spent almost every night with appellant, who lived in Lompoc with his mother Jo Ann and his son Jobe. About two weeks into the relationship, appellant told Doe he wanted to get married and start a family. In late January, Doe discovered she was approximately four weeks pregnant. Appellant accused her of being pregnant prior to their relationship and of lying about him being the father. Appellant believed Doe was cheating on him and called her a "stupid bitch" and a "fucking whore."

At about 7:00 p.m. on March 28, 2007, Doe and appellant began "fooling around" in his bedroom. Doe did not feel like engaging in sexual intercourse, so she started masturbating and orally copulating appellant. At some point, Doe noticed appellant was getting frustrated. Appellant then told Doe he thought she had laughed at him, even though she had not. When Doe stopped orally copulating appellant and leaned

[2] *People v. Marsden* (1970) 2 Cal.3d 118.

back against the bed, he got up, punched her twice in the face, and asked her whether it was funny now. Doe said it was not funny and began crying. Appellant proceeded to kick her in the face with a karate-type kick. When Doe ended up on the floor, appellant began choking her and banging her head against the ground. He told her he was going to murder her and her family. Doe thought she was going to die and feared for her family's safety. She was having difficultly breathing and briefly lost consciousness due to the strangulation.

When Doe regained consciousness, appellant screamed at her to "get up." Appellant noticed Doe looking at his shotgun, which was leaning against the outside of a closet, and asked her why she was looking at it. He then retrieved the gun, pointed it at her, and threatened to kill her. Although Doe believed the threat, she pushed the barrel of the gun down with her hand.

Appellant decided to cover up the assault by concocting a story that Doe's visible facial injuries had been inflicted by someone else. After appellant and Doe drove to the Mission Hills Market and parked in a dirt lot, appellant called 911 and said his girlfriend had just been assaulted. At about 11:40 p.m., Santa Barbara County Deputy Sheriff Joaquin Oliver and his partner arrived at the scene. Appellant and Doe both told the deputies that three Black men approached them as they were sitting in their car and that one of the men reached through the open window and hit Doe in the face. Shortly after the deputies left, Deputy Oliver called Doe's cell phone because he was suspicious of their account of the incident. When Doe did not answer, the deputy left a voicemail asking her to call him back.

Doe told appellant she wanted to go home, but appellant told her to drive to his house instead. After they pulled into the driveway, appellant ordered Doe to call her parents and tell them the same story they had told the police. Doe called her parents and began telling them the story. She started crying and handed the telephone to appellant, who completed the story. Shortly thereafter, appellant called Doe's mother and told her Doe was "fine" and "resting." Doe again told appellant that she wanted to go home, but

he refused to let her go. Doe went into appellant's house because she feared what he would do if she did not comply. After they went in appellant's room, appellant told Doe that he would murder her and her family if she did not "stick to the story." Doe believed the threat, and feared that appellant would overpower her if she attempted to leave his room.

Appellant asked Doe to masturbate him and have sex with him. She told him that she did not want to, but complied because she was afraid he would hit her again. During the intercourse, appellant smiled and told Doe to "act like you like it." He also told her to stick her finger in her anus, and she complied because she was afraid he would do something else to her if she did not.

Doe told appellant several more times that she wanted to go home. He finally agreed after she promised to continue telling the false story about her facial injuries. Doe arrived home at around 2:00 a.m. She initially told her mother she could not remember anything about the incident, then became hysterical and said she was afraid appellant was going to kill her and her family. Doe then told her parents what had really happened. Doe's father called Deputy Oliver, who arrived at their house at about 3:00 a.m.

Deputy Oliver took Doe and her mother to a Sexual Assault Readiness Team (SART) in Lompoc, where Doe was examined and interviewed. Doe had a black eye, a fracture to her sinus, bruising on her left cheek, neck, and chest, and scratches on her left clavicle, jaw and ear. There were also small broken blood vessels in and around her eyes that were consistent with strangulation and direct trauma. Lesions on her neck were also consistent with strangulation. Doe told the nurse that she had been punched and choked into unconsciousness, that appellant had penetrated her vagina with his penis and her anus with his fingers, and that she had orally copulated him. Appellant's DNA was found in sperm obtained from Doe's vaginal swab.

Doe was taken to the emergency room so that the health of her fetus could be determined. At about 10:00 a.m., Doe was at the hospital when she received a text

message from appellant asking if she was okay. Deputy Oliver and another officer asked Doe to call appellant and persuade him to come to the hospital so that they could arrest him. Doe called appellant, who eventually agreed to meet her at the emergency room. When appellant arrived, he was arrested.

Evidence of Prior Misconduct (Evid. Code, §§ 1108, 1109)

In late 1996, when appellant was 20 years old, he spent the night at the home of 17-year-old K.M. Appellant and K.M. worked together at a grocery store in Lompoc, and had been dating for about two months. K.M. had never engaged in sexual intercourse with appellant, and had no intention of ever doing so. During the night, the two were kissing and "fooling around" on K.M.'s bed when appellant got on top of her. She told him she could not breathe, but he did not move. Instead, he removed their clothes, put on a condom, and held K.M.'s hands down while he penetrated her vagina with his penis. K.M. loudly told appellant to stop and tried to kick him off of her. When appellant was done, he lay next to K.M. and wrapped his arms around her. K.M. repeatedly asked appellant to let her get up and use the bathroom, but he refused. K.M. never dated appellant again, and left Lompoc in January 1997 to get away from him. She never reported the incident to anyone because she was "too ashamed and too unaware of how to even construct what had happened."

In March 1998, appellant married Sarah P., who was five months pregnant with his child. They lived with Jo Ann[3] in Lompoc. About three days after the wedding, Jo Ann saw appellant pushing Sarah P. around in their bedroom while telling her that she was not living up to his standards. When Jo Ann entered the room and told appellant to stop, he pushed and shoved her. Jo Ann told appellant she was going to call the police. As she attempted to do so, appellant broke the bedroom door and the telephone. Jo Ann told appellant's maternal grandmother, who was also present in the house, to call the police. Appellant chased his grandmother outside, then got on top of her after she fell on

[3] Appellant's relatives are referred to by their first names for ease of reference, and not out of disrespect.

the pavement. When Jo Ann attempted to pull appellant off, he hit her in the back of the head. Jo Ann eventually went to the police station and filed a report.

In November 1999, appellant married Heather G. After the wedding, appellant and Heather G. lived at Jo Ann's house along with appellant's son Jobe and his brother Jay. From the beginning of the marriage, Heather G. felt "threatened" and "scared for [her] life." Appellant was physically abusive, called her a "slut" and a "whore," and never allowed her to go anywhere by herself due to his jealousy. A couple of weeks after the wedding, appellant choked her because he believed she was with another man.

About a week later, Heather G. filed a police report and sought temporary restraining orders against appellant. After another week, she went back to appellant and had the restraining orders dismissed. On December 29, 1999, appellant asked her to write a letter to him in which she recanted her statements to the police about the choking incident and professed her love for him. Shortly thereafter, Heather G. discovered she was pregnant. For the next three months or so, appellant and Heather G. rarely left appellant's bedroom. Appellant prevented Heather G. from calling anyone, and did not allow her to see her mother when she regularly stopped by with Heather G.'s mail. One night, appellant accused Heather G. of looking at the occupants of a van while they were at a drive-thru restaurant. When she told him she had no idea what he was talking about, he backhanded her and then prevented her from seeing her gynecologist until her black eye healed. On other occasions, he hit her in the leg and head, pushed her against a car, dragged her down the hallway by her hair, and threatened to shoot her. He also threatened to kill her if she ever left him and told the police about his abuse. He also said he would kill Heather G.'s baby and her family if the baby was not born white. There were times when he forced Heather G. to have sex with him. On one occasion, he anally sodomized her against her will and used a pillow to muffle her screams. On February 2, 2000, Heather G. left appellant and sought a restraining order against him because she feared he would kill her. She never saw appellant again, and eventually obtained a

divorce.

Appellant met Adrianna C. in the summer of 2000. Within a few months, they were living together in Lompoc with Jo Ann, Jobe, Jay, and Anthony Perkins. Adrianna C. continued living with appellant for the next year in Lompoc and Fortuna. Appellant hit Adrianna C. on a regular basis. On September 26, 2000, he threw her to the ground and choked her because he was upset at her for failing to plan anything special for his birthday. While they were living in Fortuna, appellant drove her to a lumberyard, ordered her outside, and told her to put her hands on the car while looking straight ahead. He proceeded to hit her on the back of the head until she collapsed, then repeatedly kicked her as she was lying on the ground. When she tried to run away, she grabbed her, forced her back into the car, and drove to his cousin's house where they were staying. Appellant ordered her into the bathroom and told her she was going to pay for what she did. After she pulled her pants down and bent over as he commanded, he sodomized her until he ejaculated.

On another occasion in Fortuna, appellant shoved Adrianna C. against the kitchen counter and then kicked and stomped on her after she fell. Adrianna C. left and went to her mother's house in Carpinteria after the incident, but returned about two weeks later because she loved appellant and Jobe. Appellant also controlled the time she spent with her family, and explained to her in detail how he was going to kill them. Once, he forced her to orally copulate him while he was driving. When she discovered she was pregnant in the spring of 2001, he threatened to kill her if she did not get an abortion. Believing the threat, she terminated the pregnancy. The following summer, appellant told her to write a statement denying that he had ever physically abused her or anyone else, and threatened to kill her if she did not comply. Shortly after Adrianna C. provided appellant with such a statement, the relationship finally ended.

In July 2006, appellant met Lucinda W. at a bowling alley in Lompoc. On August 25, 2006, they were married and moved in with Jo Ann. Arguments began about three days after the wedding. On one occasion, appellant pulled Lucinda W. off the bed

and told her to get out of the house after she asked him to say "please." He also prohibited her from bringing her cell phone into the house because he believed she was talking to other men. In early October 2006, Lucinda W. moved out and filed for divorce.

The Bigamy Charge

On October 18, 2006, appellant married Looriya S. in Las Vegas. After the wedding, Looriya S. went to live with a friend in Santa Maria. Appellant occasionally stayed with them. In December 2006, Looriya S. moved to Los Angeles to stay with a cousin who had come from Thailand. Appellant told Looriya S. that he was going to be recalled by the military. Looriya S. continued to visit appellant in Lompoc and Santa Maria. Looriya S. had no idea that appellant was dating someone else. Their marriage was never consummated because Looriya S. was waiting until after their marriage in Thailand, which was supposed to take place in late 2007. Looriya S. nevertheless considered appellant to be her husband, and told everyone that she was his wife. At the time of trial, Looriya S.'s divorce from appellant was not yet final.

Appellant's Defense

Appellant's sister Deanna, his brothers Michael and James, and his mother Jo Ann all testified that they had never seen appellant act violently toward Heather or Adrianna. Deanna testified that she was friends with K.M. and saw her about five times after the alleged rape. According to Deanna and appellant's brother Michael, K.M. never expressed any concerns about appellant. Jo Ann testified that she never saw appellant acting inappropriately toward K.M. Michael, James and Jo Ann were never told by Adrianna that appellant was abusing her. Jo Ann, her friend James Christopher Ames, and neighbors Mark and Brittany Hammond all testified that they did not hear any screams coming from appellant's room around the time he allegedly raped Doe.

Defense investigator Frank Salazar criticized law enforcement for failing to interview Deputy Oliver in greater detail about his encounter with appellant and Doe at Mission Hills Market. He also believed that the prosecution had failed to adequately seek

witnesses to corroborate appellant's victims and mishandled his shotgun.

DISCUSSION

I.

Marsden

Appellant contends the trial court failed to conduct a proper hearing on his final *Marsden* motion and failed to conduct the inquiry necessary to determine whether to appoint substitute counsel to investigate a claim of ineffective assistance of counsel prior to the sentencing hearing. We disagree.

A.

Background

At the beginning of the sentencing hearing on October 17, 2007, the court was informed that on September 26 appellant had submitted a form-generated petition to proceed in propria persona along with another *Marsden* motion against his attorney, David Bixby.[4] In the petition for self-representation, which appellant dated and signed on September 18, 2007, he stated, "it is my personal desire that I be granted permission by the Court to proceed IN PROPRIA PERSONA (acting as my own attorney) and that by making this request I am giving up the right to be represented by a lawyer appointed by the Court." On the last page of the petition, appellant also requested a mistrial. Attached to the petition was a handwritten letter addressed to the trial judge, which appellant identified as "my Request for Miss-trial [*sic*] and *Farretta* [*sic*] Motion." The *Marsden* motion, which was signed and dated on September 7, 2007, contained a form checklist of general allegations regarding trial counsel's assistance. Appellant also specifically alleged that Bixby had "deliberately filed a motion with intent to mislead the

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4 Appellant had three different attorneys in the course of the proceedings and filed a total of five *Marsden* motions. The first motion was filed against appellant's deputy public defender prior to the preliminary hearing. After the motion was denied, the public defender's office declared a conflict and Charles Biely was appointed to represent appellant. The court subsequently granted appellant's pretrial *Marsden* motion against Biely and appointed Bixby. Appellant filed two *Marsden* motions against Bixby prior to trial, both of which were denied.

court and undermind [*sic*] my request to testify" and had "deliberately attempted to undermind [*sic*] testimony during trial which was given by Michael Kennedy a defense witness to destroy defense evidence."

After the court ordered the petition and motion filed, it proceeded to address the petition for self-representation first. The court reasoned that "[a]s a practical matter, if he represents himself, then there's no need for a *Marsden* hearing." The court found that appellant had the capacity to waive his right to counsel and that his waiver was knowing, voluntary, and intelligent. The court then asked appellant whether he was requesting a *Faretta*[5] hearing or a *Marsden* hearing. Appellant responded that he was requesting a *Faretta* hearing. When the court asked appellant if he wanted to be his own lawyer, appellant replied "as far as I understand it, even though it isn't necessary to have a *Marsden*, I believe it is my right to have a *Marsden* and also to [*sic*] a *Faretta*. As far as the *Faretta*, that's what I'm requesting at this point." When appellant also stated his belief that a *Marsden* motion would be "more appropriate at this point," the court explained the difference between the two motions. After appellant said he understood the distinction, the court asked, "do you want to be your own lawyer?" Appellant responded, "I do, sir." The court then granted appellant's *Faretta* motion and denied his motion for a mistrial.

B.

Analysis

Appellant asserts the court erred in granting his *Faretta* motion prior to inquiring into the grounds for his *Marsden* motion. While appellant did not file a formal motion for new trial alleging ineffective assistance of counsel, he contends the court was nevertheless obligated to determine whether he was entitled to the appointment of substitute counsel to litigate such a motion on his behalf, as contemplated by *People v. Smith* (1993) 6 Cal.4th 684, 693. We reject this contention.

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5 *Faretta v. California* (1975) 422 U.S. 806.

Appellant prepared and signed his final *Marsden* motion on September 7, 2007. In support of the motion, appellant provided numerous grounds upon which he believed trial counsel had provided ineffective assistance, most notably that counsel had "undermined" his request to testify. Nine days later, appellant prepared and signed a self-styled "Request for Miss-trial [*sic*] and *Farretta* [*sic*] Motion" in which he also stated his belief that trial counsel had interfered with his right to testify. After the court explained that the *Marsden* motion would be deemed moot if the *Faretta* motion were granted, appellant stated his understanding of the procedure and unequivocally requested self-representation.

While we have concerns over the process employed by the trial court, here there was no error. Contrary to the court's reasoning, its ruling on the *Faretta* motion would not necessarily render the *Marsden* motion moot because the request for self-representation could have been conditioned on the court's denial of the request for substitute counsel. Because the court must ensure that a defendant's waiver of the right to counsel is knowing and voluntary, the more prudent course would have been to hear the *Marsden* motion first.

Appellant's comments, however, reflect that his *Faretta* request was *not* conditioned on the denial of his request for another attorney. While both motions were presented to the court at the same time, the *Faretta* motion was prepared 11 days after the *Marsden* motion. In the *Faretta* motion, appellant stated "by making this request I am giving up the right to be represented by a lawyer appointed by the Court." Appellant also expressed his understanding that he was entitled to have both motions heard, and he assured the court that he fully understood the distinction between the two. After this exchange, appellant unequivocally stated that he wanted to represent himself for the remainder of the proceedings. Under the circumstances, the court could reasonably conclude that appellant was effectively withdrawing his *Marsden* request in favor of the *Faretta* motion. The court thereafter had no obligation to determine whether appellant actually wanted another attorney. "The only determination a trial court must make when

presented with a timely *Faretta* motion is whether the defendant has the mental capacity to waive his constitutional right to representation by an attorney with a realization of the probable risks and consequences. [Citation.] A request for self-representation does not trigger a duty to conduct a *Marsden* inquiry [citation] or to suggest substitution of counsel as an alternative. [Citation.]" (*People v. Crandell* (1988) 46 Cal.3d 833, 854-855, overruled on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

To the extent appellant asserts that a new trial motion survived the waiver of his request to have substitute counsel appointed to litigate the motion, we conclude that the court effectively considered and denied the claims raised therein in ruling on appellant's motion for a mistrial. As appellant acknowledges, the mistrial motion filed in conjunction with his *Faretta* motion "put the court and the parties on notice that appellant wanted a new trial and, coupled with appellant's claim of ineffective counsel contained in his *Marsden* motion, adequately set forth his claim that his trial attorney had failed to provide effective representation during trial." The record also reflects that appellant urged the court to grant a mistrial on the ground that Bixby had provided ineffective assistance, and appellant did not thereafter complain that the court had failed to consider his request for a new trial. While the court did not orally inquire into appellant's specific complaints, the written motions were sufficient for the court to adjudicate the claim. (*People v. Gay* (1990) 221 Cal.App.3d 1065, 1071, fn. 1.) Under the circumstances, appellant fails to demonstrate that the court failed to properly adjudicate either his *Marsden* motion or any claim of ineffective assistance included therein.

II.

Appellant's Request to Reopen

Appellant contends the court erred in denying his request to reopen the case to allow him to testify. We conclude the request was properly denied as untimely.

Trial courts have discretion to order a case reopened to permit the introduction of additional evidence. (*People v. Funes* (1994) 23 Cal.App.4th 1506, 1520.) In determining whether a court has abused its discretion in denying a request to

reopen, we consider the following: "'(1) the stage the proceedings had reached when the motion was made; (2) the [requesting party's] diligence (or lack thereof) in presenting the new evidence; (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence.' [Citation.]" (*People v. Jones* (2003) 30 Cal.4th 1084, 1110.)

Appellant's request to reopen came during the rebuttal phase of the prosecutor's closing argument. In conveying the request, counsel informed the court that reopening the case "would be against my request or my admonition or belief of what should happen." The court initially denied the request as untimely, then asked defense counsel to research and brief the issue. The following day, appellant filed a motion to reopen stating that appellant wanted to offer testimony he believed would rebut propensity evidence presented by the prosecution. For example, appellant wanted to testify about military records purporting to show he was out of state at the time he allegedly raped K.M. Trial counsel acknowledged that he had been unable to locate any such records and that he and appellant had previously decided he would not testify. At the hearing on the motion, the prosecutor offered records indicating that appellant did not join the military until well after the rape. The prosecutor also noted the defense had presented evidence that appellant was in Colorado with his brother at the time of the rape. The court again found the request to reopen untimely, and accordingly denied the motion.

The court acted well within its discretion in denying appellant's request to reopen. The request was made at the latest possible stage of the proceedings. Moreover, appellant did not exercise diligence in offering his proffered testimony, which in any event was not based on new evidence. Allowing appellant to testify at such a late stage of the proceedings would also have been unfair to the prosecution, in that it would have given him the unwarranted opportunity to craft his testimony to the prosecution's specific arguments. It also may have given the jury the false impression that the testimony was particularly important. Finally, the significance of the proffered evidence is questionable. Appellant sought to offer an alibi that conflicted with the alibi evidence he presented at

trial, and he had no evidence to support the new alibi. On the contrary, the prosecution's evidence presumptively demonstrated the falsity of the proffered testimony. Because the testimony almost certainly would have been impeached, appellant cannot show a reasonable probability that the result of the proceedings would have been different had he been allowed to testify. (*People v. Jones, supra*, 30 Cal.4th at p. 1117.) Appellant's attempt to characterize the claimed error as a denial of his right to testify is unavailing because he knowingly and voluntarily waived that right earlier in the proceedings. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332-1333.)

III.

Propensity Evidence (Evid. Code, §§ 1108, 1109)

Appellant asserts that the court erred in admitting evidence of his prior uncharged conduct against other women pursuant to Evidence Code sections 1108 and 1109. We disagree.

Appellant's claims that the evidence deprived him of his federal and state constitutional rights to due process and equal protection are forfeited by his failure to object on those grounds at trial. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1122; Evid. Code, § 353.) While his objection under Evidence Code section 352 is sufficient to preserve a "very narrow due process argument"—i.e., that the court's denial of his Evidence Code section 352 objection had "the additional legal consequence of violating due process" (*People v. Partida* (2005) 37 Cal.4th 428, 433-435)—that argument has been rejected. (*People v. Falsetta* (1999) 21 Cal.4th 903, 916, 922 [Evid. Code, § 1108]; *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704 [Evid. Code, § 1109].)

We also reject appellant's claim that the court abused its discretion in admitting the evidence over his Evidence Code section 352 objection. Uncharged offenses offered to show a defendant's propensity to commit domestic violence and sexual assaults are not made inadmissible by the general rule against propensity evidence. (Evid. Code, §§ 1108, 1109.) Pursuant to Evidence Code section 352, the trial court has discretion to exclude such evidence "if its probative value is substantially outweighed by

the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." The court can only be said to have abused its discretion in resolving the issue "when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Kipp, supra,* 18 Cal.4th at p. 371.)

Appellant does not dispute that the evidence of his uncharged offenses was relevant to demonstrate his propensity to commit sexual offenses and domestic violence against women with whom he was intimate. (See *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1335.) He contends, however, that the evidence should have been excluded as substantially more prejudicial that probative. We reject this contention. Appellant's uncharged offenses were similar to the charged crimes and demonstrated a particular pattern of violence in his prior relationships. (See, e.g., *People v. Cabrera* (2007) 152 Cal.App.4th 695, 706.) In each instance, appellant evinced an attempt to exercise total control over his current girlfriend or wife through sexual or physical abuse. With K.M., Heather, Adrianna, and Doe, he engaged in forcible sex as a means of achieving his goal and appeared to derive sadistic pleasure in committing the act. With Heather, Adrianna, Lucinda and Doe, he exhibited irrational jealousy and isolated his victims from their friends and family. Heather, Adrianna, and Doe were all subjected to criminal threats and were coerced to lie to protect appellant from prosecution.

Moreover, the highly probative value of the challenged evidence was not substantially outweighed by its prejudicial effect. As contemplated by Evidence Code section 352, "'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that "'uniquely tends to evoke an emotional bias against defendant"' without regard to its relevance on material issues. [Citations.]" (*People v. Kipp, supra,* 26 Cal.4th at p. 1121.) Appellant's uncharged offenses were not significantly more inflammatory than his crimes against Doe, the evidence that he committed the charged crimes was compelling, and the jury was properly instructed on the purposes for which it might consider the evidence of appellant's prior acts. Considering all of the relevant

factors, the trial court did not exceed the bounds of reason in concluding that the probative value of the uncharged crimes evidence was not substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. Accordingly, the court did not abuse its discretion in admitting the evidence over appellant's Evidence Code section 352 objection.

IV.

Sufficiency of the Evidence

Appellant contends the evidence is insufficient to support his convictions for forcible rape, torture, and kidnapping for the purpose of rape. He also challenges the sufficiency of the evidence supporting the jury's finding that in committing the rape he kidnapped and tortured the victim, as contemplated by section 667.61, subdivision (c). We conclude that substantial evidence supports all of appellant's convictions.

A.

Standard of Review

In assessing the sufficiency of evidence to support a judgment, we review the evidence most favorably to the judgment to determine whether reasonable and credible evidence exists from which a reasonable trier of fact could have determined guilt beyond a reasonable doubt. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) We do not redetermine the weight of the evidence or the credibility of witnesses. (*Ibid.*) Nor do we substitute our reasonable inferences drawn from the evidence for those drawn by the trier of fact. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

B.

Forcible Rape

To convict appellant of forcible rape, the jury had to find that he accomplished sexual intercourse against Doe's will either (a) by means of force, violence, duress, menace, or fear of immediate bodily injury on Doe or someone else, or (b) by threatening to retaliate against her or someone else in the future with a reasonable

possibility that he would carry out the threat. (§ 261, subds. (a)(2) & (a)(6).) In context, duress is defined as "a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted." (§ 261, subd. (b).) The total circumstances, including Doe's relationship to appellant, were factors to consider in determining whether the rape was accomplished by duress. (*Ibid.*)

Substantial evidence supports appellant's conviction for forcible rape. The totality of the circumstances supports the conclusion that Doe had sexual intercourse with appellant against her will because she feared that he would further harm her or harm her family if she did not comply. Appellant viciously attacked Doe while she was orally copulating him and threatened to kill her and her family. After appellant coerced Doe to help him fabricate a story about the substantial injuries he had inflicted on her, he refused her pleas to go home and made her return to his house. Following another threat against her family, Doe reluctantly returned to appellant's bedroom where he threatened her once again and initiated sexual activity. While Doe initially expressed that she did not want to engage in sexual intercourse, she ultimately complied because she was afraid that appellant would assault her again if she refused. The jury could infer from this evidence that appellant engaged in sexual intercourse with Doe against her will by means of duress. "That appellant may have deluded himself into believing [Doe's] eventual submission represented a consensual act could have been rejected by a rational trier of fact as an unreasonable response to [Doe's] conduct." (*People v. Barnes* (1986) 42 Cal.3d 284, 305.) The jury could also infer that appellant committed the crime by means of force or threat, in that his earlier assault and threats against Doe and her family served to undermine her will to resist his advances. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1027.) The jury's finding is further supported by the evidence that appellant had previously engaged in similar conduct against other women. (*People v. Garcia, supra*, 89 Cal.App.4th at p. 1335.)

C.

Torture

A defendant is guilty of torture when he inflicts great bodily injury on his victim with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose. (§ 206.) According to appellant, "the manner in which [Doe's] injuries were inflicted does not indicate a sadistic or vengeful purpose, not was the infliction of the injuries accompanied by an intent to cause extreme pain." We reject this assertion. A defendant's intent to cause cruel or extreme pain may be established by the circumstances of the offense. (*People v. Hale* (1999) 75 Cal.App.4th 94, 106.) Appellant's attack on Doe was prompted by his belief that Doe had laughed at him while she was orally copulating him. After he punched her in the face, he asked her whether she thought it was still funny and then proceeded to kick her in the face. He then banged her head on the ground and choked her into unconsciousness. When she woke up, he pointed a shotgun at her and threatened to kill her. The fact that appellant inflicted non-lethal injuries on a particularly vulnerable area of Doe's body supports the inference that he intended to cause extreme pain. (*People v. Chatman* (2006) 38 Cal.4th 344, 390-391; *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1163.) Moreover, appellant's cavalier attitude and the humiliating circumstances surrounding the crime give rise to a reasonable inference that appellant's attack on Doe was committed for revenge or sadistic purposes. (See, e.g., *People v. Misa* (2006) 140 Cal.App.4th 837, 843 [defendant hit victim with golf club, insulted and threatened him for 30 minutes, and ate breakfast as he lost consciousness].)**6**

We also reject appellant's challenge of the jury's finding that he tortured Doe in the commission of the charged rape, as contemplated by section 667.61,

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6 Appellant acknowledges that "courts have rejected attempts by defendants to argue that, as compared to the facts of other torture cases, theirs is less egregious [citations]," then proceeds to present an exhaustive discussion of the facts of other torture cases as "illuminating" of the issue at hand. Suffice to say that appellant's discussion is unavailing. (See, e.g., *People v. Baker* (2002) 98 Cal.App.4th 1217, 1224-1225.)

subdivision (d)(3). This contention is based on the erroneous premise that the rape did not begin until the moment that appellant engaged in sexual intercourse with Doe. As we have explained, the physical attack upon which the torture conviction is based was the first manifestation of appellant's intent to have sexual intercourse with Doe with or without her consent. The jury could infer that the attack was prompted by appellant's frustration in failing to achieve satisfaction during Doe's oral copulation, and was intended to ensure her compliance with his desire to achieve such satisfaction through intercourse. The jury's finding is further supported by the evidence that appellant committed a similar crime against Adrianna when he viciously assaulted her, drove her against her will to their house, and forcibly sodomized her.

D.

Kidnapping for the Purpose of Rape and Kidnapping Special Circumstance

Appellant also challenges the sufficiency of the evidence to prove that he kidnapped Doe with the intent to rape her, which provides the basis for his conviction under section 209, subdivision (b)(1) as well as the "one strike" allegation that he kidnapped Doe in committing the rape. We conclude that the jury's findings in this regard are supported by substantial evidence.

Section 209, subdivision (b) provides in pertinent part: "(1) Any person who kidnaps or carries away any individual to commit . . . rape . . . shall be punished by imprisonment in the state prison for life with the possibility of parole. [¶] (2) This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." A conviction under the statute requires proof that the defendant acted with the intent to commit rape when he moved the victim a substantial distance. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1151.) By contrast, an aggravated kidnapping special circumstance finding under section 667.61, subdivision (d), does not require evidence that the defendant had a preexisting intent to commit rape when he kidnapped his victim. (*People v. Jones* (1997) 58

Cal.App.4th 693, 717.)

As we have noted, the jury could infer from the evidence that appellant's crimes against Doe were all part of a continuous course of conduct primarily directed at achieving sexual gratification. When he was unable to achieve an orgasm during oral copulation, he falsely accused Doe of laughing at him and tortured her. After the attack, he became worried about Doe's injuries and concocted a story to cover his culpability. That story necessitated driving with Doe to another location. Afterward, Doe told appellant she wanted to go home, but he decided to drive her back to his house against her will. While appellant did not want Doe to go home because he feared her parents would find out what had happened, he also wanted to achieve the sexual gratification that he had been unable to achieve earlier. In light of this evidence, the jury could infer that appellant's movement of Doe was not only beyond that merely incidental to his commission of the rape, but also increased the risk of harm to Doe beyond what was necessarily present in the commission of that crime. Further support for this inference lies in the evidence that appellant committed a similar crime against Adrianna. The evidence is therefore sufficient to sustain the jury's finding that appellant kidnapped Doe for the purpose of rape, as well as its true finding on the kidnapping special circumstance allegation on the forcible rape count.

V.

Requests for Advisory Counsel and a Continuance of the Sentencing Hearing

Appellant contends the court erred in denying his requests for advisory counsel and a continuance of the sentencing hearing after it granted his request for self-representation. We conclude the court did not abuse its discretion in denying either request.

A.

Advisory Counsel

A defendant who elects to represent himself has no constitutional right to advisory counsel. (*People v. Clark* (1992) 3 Cal.4th 41, 111.) Requests for advisory

counsel are left to the sound discretion of the trial court and if "'. . . there exists "a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside . . . .'" [Citations.]" (*People v. Crandell, supra,* 46 Cal.3d at pp. 862-863.)

The trial court did not abuse its discretion in denying appellant's request for advisory counsel. Appellant made no showing that advisory counsel would have been helpful to his case. His attorney had already filed and argued a new trial motion prior to appellant's appointment to represent himself, and appellant's claim of ineffective assistance of counsel had already been adjudicated. In addition, the sentencing hearing had already been continued and appellant had anticipated representing himself for several weeks prior to the hearing. Appellant does not claim that he was unable to adequately represent himself without assistance, nor could he. "[A] defendant who has competently elected to represent himself should not be heard to complain that he was denied the assistance of advisory or stand-by counsel." (*People v. Garcia* (2000) 78 Cal.App.4th 1422, 1431.) Because it is not reasonably probable that appellant would have achieved a more favorable result had advisory counsel been appointed, any error in denying his request would not compel reversal of his conviction. (*People v. Crandell, supra,* 46 Cal.3d at pp. 864-865.)

B.

Continuance

Continuances are granted only upon a showing of good cause. (*People v. Froehlig* (1991) 1 Cal.App.4th 260, 265; § 1050, subd. (e).) "The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. [Citation.]" (*People v. Beames* (2007) 40 Cal.4th 907, 920.) In establishing good cause for a continuance, "[a]n important factor for a trial court to consider is whether a continuance would be useful. [Citation.] . . . [T]o demonstrate the usefulness of a continuance a party must show both the materiality of the evidence necessitating the continuance and that such evidence could

be obtained within a reasonable time." (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

Appellant fails to show that the court abused its discretion in denying his request to continue the sentencing hearing. He failed to show good cause for failing to comply with the notice requirements for a request for a continuance, much less good cause for a continuance. (§ 1050, subd. (b); see *People v. Clark* (1990) 50 Cal.3d 583, 625 [recognizing that "[a] defendant appearing in propria persona is held to the same standard of knowledge of law and procedure as is an attorney"].) His attorney had already filed a response to the probation report, and appellant made no offer of proof that any evidence or arguments relating to his sentence were unavailable to him at the time of the hearing. While he asserts on appeal that "he had no idea what factors in aggravation and mitigation were being considered by the court" and was unaware of other factors relating to sentencing, the record is devoid of any evidence supporting this claim. As the court stated in denying appellant's request for a continuance, "when you're your own lawyer, you're obligated to do everything that lawyers would do. There's not a member of the State Bar who could appear in front of me right now in your place and explain why this should be continued. There's no good cause to continue it." The court did not err.

VI.

Section 654

Appellant was sentenced to consecutive terms on all counts with the exception of count 3 (kidnapping for the purpose of rape), which was stayed pursuant to section 654. Appellant does not challenge his sentences for forcible rape and bigamy. He asserts, however, that sentencing on all other counts should have been stayed pursuant to section 654 because "each and every individual act charged as a separate criminal offense was part of the single intent and plan to accomplish an act of sexual intercourse with Jane Doe and to escape detection for committing the offense." He alternatively argues that the torture and assault involved the same infliction of great bodily injury and the charges of making a criminal threat and dissuading a witness were based on the same threat, such that he could only be punished once on each set of counts. While we accept

the People's concession that section 654 barred separate punishment for the torture, we conclude that consecutive sentencing on the remaining counts was proper.[7]

Section 654 provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

"The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. . . .' [Citation.]" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' " (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) We review the court's ruling in the light most favorable to the judgment, and presume the existence of every fact the court could reasonably deduce from the evidence. (*Ibid.*)

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[7] In accordance with the People's concession, we shall order the judgment amended to reflect a stayed term of 7 years to life on count 2, which results in a total indeterminate term of 25 years to life.

Substantial evidence supports the imposition of consecutive sentences for assault, making a criminal threat, and dissuading a witness. The assault preceded the rape by more than an hour, so appellant had sufficient time to reflect on his actions before committing the latter offense. Moreover, the trial court could infer that the assault was not merely incidental to the rape, but rather was motivated by an independent desire to punish Doe because he thought she had laughed at him after noticing his frustration with her attempts to orally copulate him. Under the circumstances, imposition of a consecutive sentence is consistent with section 654's purpose to ensure that a defendant's punishment is commensurate with his culpability. In other words, appellant was properly subjected to greater punishment than the sentence he would have received had he merely raped his victim. (See *People v. Alvarado* (2001) 87 Cal.App.4th 178, 198-199.)

In sentencing appellant to consecutive terms for making a criminal threat and dissuading a witness, the court noted that the criminal threat charge was primarily based on the threats appellant made during the torture and assault. The threat giving rise to the dissuading charge, which consisted of his threat to kill Doe and her family if she did not "stick to the story" he had concocted about the injuries he had inflicted in the course of the torture and assault, was made several hours later. The court could infer from this evidence that the two crimes were motivated by independent objectives and were therefore deserving of separate punishment.

VII.

Sentencing Error in Abstract of Judgment

The People correctly note that the abstract of judgment erroneously identifies the 10-year firearm enhancement on the forcible rape count (count 1) as two separate five-year enhancements under section 12022.5, subdivision (a)(1), and 12022.53, subdivision (b). The judgment should reflect a 10-year enhancement under section 12022.53, subdivision (b), with the section 12022.5, subdivision (a)(1) enhancement stayed. (§ 12022.53, subd. (f).) We will order the judgment corrected accordingly.

DISPOSITION

We modify the judgment to reflect (1) a 10-year term for the section 12022.53, subdivision (b), enhancement on count 1; (2) a stayed 5-year term for the section 12022.5, subdivision (a)(1), enhancement on count 1; and (3) a stayed term on count 2, for a modified aggregate term of 23 years 4 months plus 25 years to life. We direct the trial court to prepare an amended abstract of judgment and forward it to the Department of Corrections. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James F. Rigali, Judge

Superior Court County of Santa Barbara

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Jaime L. Fuster, Deputy Attorney General, for Plaintiff and Respondent.